Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

CHEMTURA CANADA CO./CIE (formerly known as CROMPTON CO./CIE, formerly known as UNIROYAL CHEMICAL LIMITED),

Cross-Petitioner,

v.

UNITED STATES OF AMERICA,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit erred in holding – contrary to the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits – that an entity that exercised no control over the disposal or treatment of hazardous substances, and had neither the authority nor the opportunity to control the disposal or treatment of hazardous substances, may nevertheless be held liable as one that "arranged for" the disposal or treatment of hazardous substances under § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*

2. Whether retroactive application of § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, to impose unforeseeable joint-and-several liability for over $110 million based on lawful, non-negligent conduct involving only about $1.5 million in transactions violates the Fifth Amendment to the United States Constitution.

3. Whether inflexible application of the cancer potency factor for dioxin used by the Environmental Protection Agency constitutes the enactment of a legislative rule without notice and comment contrary to the Administrative Procedure Act, 5 U.S.C. § 553.

CORPORATE DISCLOSURE STATEMENT

Chemtura Canada Co./Cie, formerly known as Crompton Co./Cie, formerly known as Uniroyal Chemical Limited, is wholly owned by Crompton European Holdings B.V., a Dutch company, and is indirectly wholly owned by Chemtura Corporation, whose stock is publicly traded on the New York Stock Exchange.

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Chemtura Canada Co./Cie, formerly known as Crompton Co./Cie, formerly known as Uniroyal Chemical Limited ("Uniroyal"), conditionally cross-petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Uniroyal's related petition for a writ of certiorari was docketed in this Court as Case No. 06-853.

OPINIONS BELOW

Pursuant to Supreme Court Rule 14(i), Uniroyal reproduced the relevant opinions of the Court of Appeals and United States District Court for the Eastern District of Arkansas in its petition for a writ of certiorari docketed as Case No. 06-853. *United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir. 2001) (Appendix C); *United States v. Vertac Chemical Corporation*, 453 F.3d 1031 (8th Cir. 2006) (Appendix A); *United States v. Vertac Chemical Corporation*, 966 F. Supp. 1491 (E.D. Ark. 1997) (Appendix E); *United States v. Vertac Chemical Corporation*, 33 F. Supp.2d 769 (E.D. Ark. 1998) (Appendix D); and *United States v. Vertac Chemical Corporation*, 364 F. Supp.2d 941 (E.D. Ark. 2005) (Appendix B).

JURISDICTION

The Court of Appeals filed its opinion on July 13, 2006. The Court of Appeals denied a timely petition for rehearing and rehearing *en banc* on September 19, 2006. Hercules Incorporated's petition for a writ of certiorari was docketed on December 21, 2006. Uniroyal files this petition within 30 days of December 21, 2006. This Court has jurisdiction under 28 U.S.C. § 1254 and Rule 12.5 of the Rules of the Supreme Court, and this cross-petition is conditional upon this Court's grant of Hercules Incorporated's petition for a writ of certiorari.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act provides, in pertinent part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—. . . (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by another party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . shall be liable . . . .

42 U.S.C. § 9607(a).

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 533 of the Administrative Procedure Act provides, in pertinent part:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. . . .

* * * *

> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. . . .

5 U.S.C. §§ 553(b), (c).

STATEMENT OF THE CASE

This petition arises from actions brought by the United States, the State of Arkansas, and Hercules Incorporated ("Hercules") against Uniroyal, culminating in a judgment of joint-and-several liability for over $110 million under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* The District Court originally had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1335, 42 U.S.C. § 6973, and 33 U.S.C. § 1345. The District Court had subject-matter jurisdiction over claims later added under 42 U.S.C. §§ 9607 and 9613. The Court of Appeals had jurisdiction over the relevant appeals under 28 U.S.C. § 1291.

The United States initially developed the Vertac Chemical Corporation ("Vertac") site in Jacksonville, Arkansas, as a munitions factory in the 1930s. The site was sold in the 1940s to Reasor-Hill Corporation ("Reasor-Hill"), now a defunct company. Reasor-Hill began manufacturing phenoxy herbicides, including trichlorophenoxyacetic acid ("2,4,5-T"), at the site in 1958. In 1961, Hercules bought the site, and, in 1974, Hercules leased the site to Transvaal, Inc., the predecessor to Vertac. Vertac bought the site from Hercules in 1976. Hercules produced 2,4,5-T at the site from 1961 to 1970. Vertac produced 2,4,5-T at the site from 1971 until 1979. Site operators produced the other principal

product manufactured at the site, dichlorophenoxyacetic acid ("2,4-D"), from 1958 until 1986. *See United States v. Vertac Chem. Corp.*, 453 F.3d 1031, 1036-38 (8th Cir. 2006).

In 1980, the United States Environmental Protection Agency ("EPA") sued Vertac and Hercules for an injunction against the discharge of hazardous waste at the site. *United States v. Hercules, Inc.*, 247 F.3d 706, 713 (8th Cir.), *cert. denied*, 534 U.S. 1065 (2001). "The Arkansas Department of Pollution Control and Ecology sought similar relief under state law." *Id.* "Several years later, the [District Court] approved consent decrees representing a negotiated remedial plan to address the containment and monitoring of waste." *Id.* (citing *United States v. Vertac Chem. Corp.*, 588 F. Supp. 1294, 1296-97 (E.D. Ark. 1984)). "The lawsuit was later converted into" an action under CERCLA. *Id.*

> Although Vertac stipulated that it was an owner and operator of the site liable to the government for response costs under CERCLA, it ultimately failed to comply with the consent decrees and eventually sold its assets to third parties, forcing the [District Court] in 1987 to appoint a receiver to handle the company's affairs.

Id. (citing *United States v. Vertac Chem. Corp.*, 671 F. Supp. 595, 623-24 (E.D. Ark. 1987), *vacated*, 855 F.2d 856 (8th Cir. 1988) (table); *United States v. Vertac Chem. Corp.*, 756 F. Supp. 1215 (E.D. Ark. 1991), *aff'd*, 961 F.2d 786 (8th Cir. 1992)). "In an effort to identify all those potentially liable for environmental harm at the site, numerous additional parties, including the United States Department of Defense, were brought into the suit." *Id.* "These parties filed various cross-claims, counterclaims, and third party complaints; many of the parties settled [for a few million dollars] and entered into consent decrees." *Id.* at 713-14.

The Court of Appeals summarized the pertinent facts as to Uniroyal:

> Uniroyal was one of Vertac's customers and purchased 2,4,5-T and other products from Vertac in the 1970s. In 1978, Vertac informed Uniroyal that it lacked the funds to purchase enough 1,2,4,5-tetrachlorobenzene (TCB), a key ingredient in the manufacture of 2,4,5-T, to fulfill its contractual obligations to Uniroyal. Uniroyal agreed to supply Vertac with enough TCB to create some 1.3 million pounds of 2,4,5-T that was to be shipped back to Uniroyal. Vertac did not purchase the TCB directly from Uniroyal, but instead reduced the amount it charged Uniroyal for the 2,4,5-T to reflect the value of the TCB that Uniroyal had supplied. This arrangement was embodied in two separate contracts and was carried out between March 1978 and March 1979. The 2,4,5-T that was produced with Uniroyal's TCB represents less than one percent of the more than 150 million pounds of 2,4-D and 2,4,5-T that were manufactured at the site over the course of its operation.

Vertac, 453 F.3d at 1038. The District Court found that Uniroyal owned the TCB throughout the manufacturing process. The Court of Appeals upheld that finding as not "clearly erroneous." *Hercules*, 247 F.3d at 721.

Notwithstanding the issue of ownership, the parties stipulated in the District Court that Uniroyal exercised no control over Vertac's manufacture of 2,4,5-T or over the operation of the site. The District Court found that "Uniroyal was in no position to manage the disposal of any hazardous materials." *United States v. Vertac Chem. Corp.*, 79

F. Supp.2d 1034, 1040 (E.D. Ark. 1999), *vacated on other grounds*, 247 F.3d 706 (8th Cir.), *cert. denied*, 534 U.S. 1065 (2001). No one ever challenged that factual finding on appeal. Former employees and officers of Vertac testified that Uniroyal had no authority to control Vertac's operations. That Uniroyal did not have the authority or opportunity to control the disposal or treatment of hazardous substances at the Vertac site was implicit in the decisions of the District Court and the Court of Appeals. *See United States v. Vertac Chem. Corp.*, 966 F. Supp. 1491 (E.D. Ark. 1997), *aff'd in part and rev'd in part*, 247 F.3d 706 (8th Cir.), *cert. denied*, 534 U.S. 1065 (2001).

Although Uniroyal never had the opportunity to control any aspect of Vertac's disposal or treatment of any hazardous substances, the District Court found Uniroyal liable as an entity that "arranged for" the disposal or treatment of hazardous substances under CERCLA § 107(a)(3), holding that "actual control [is] not necessary for arranger liability." *Vertac Chem. Corp.*, 966 F. Supp. at 1501. Uniroyal challenged that decision on appeal, but the Court of Appeals affirmed. *Hercules*, 247 F.3d at 720; *Vertac*, 453 F.3d at 1047.

Uniroyal also argued that retroactive application of CERCLA on the facts of this case violated the Due Process and Takings Clauses of the Fifth Amendment to the United States Constitution because Uniroyal's liability was unforeseeable and substantially disproportionate to Uniroyal's conduct. The Court of Appeals initially recognized that inquiry into the constitutionality of CERCLA in this case would be "essentially ad hoc and fact intensive." *Hercules*, 247 F.3d at 722 (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion)). However, the Court of Appeals ultimately rejected Uniroyal's as-applied constitutional challenge without any analysis of the facts of the case. *Vertac*, 453 F.3d at 1047-48.

To calculate the dioxin cleanup standards for the soil and sediments at the Vertac site, EPA used an inflexible and conservative cancer potency factor that amounted to an administrative rule. Although EPA's rule regarding the cancer potency factor of dioxin was never subject to notice and comment, the Court of Appeals held EPA's action lawful, opining that EPA's rule was merely a technical and advisory report. *Vertac*, 453 F.3d at 1046.

Uniroyal first asks this Court to resolve a split among the Courts of Appeals concerning the standard for imposing "arranger liability" under CERCLA. Here, the Eighth Circuit – contrary to the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits – held an entity that exercised no control over the disposal or treatment of hazardous substances, and possessed neither the authority nor the opportunity to control the disposal or treatment of hazardous substances, liable as one that "arranged for" the disposal or treatment of hazardous substances. This cross-petition thus raises an important issue that was decided by the Court of Appeals in a manner that conflicts with the decisions of other Courts of Appeals. This Court should resolve that conflict. Sup. Ct. R. 10(a).

Uniroyal next asks this Court to decide whether retroactive application of CERCLA to impose unforeseeable, staggering joint-and-several liability that is disproportionate to the actor's lawful, non-negligent conduct violates the Fifth Amendment to the United States Constitution. The transactions at issue between Uniroyal and Vertac involved approximately $1.5 million, yet the Court of Appeals' decision could result in the imposition of liability on Uniroyal for over $110 million in remediation costs. This cross-petition raises an important federal question that was decided by the Court of Appeals in conflict with the decisions of this Court. This Court should address that question. Sup. Ct. R. 10(c).

Finally, Uniroyal asks this Court to decide whether EPA's inflexible application of its cancer potency factor for dioxin constitutes a legislative rule that was not subject to notice and comment as required by the Administrative Procedure Act. Application of EPA's rule creates over $100 billion in liability across the nation. The Eighth Circuit's opinion that EPA's rule is not subject to notice and comment conflicts with the decisions of other Courts of Appeals. This Court should resolve that conflict. Sup. Ct. R. 10(a).

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Interpretation Of CERCLA Arranger Liability Conflicts With The Statutory Language And The Decisions Of Other Courts Of Appeals.[1]

Section 107(a)(3) of CERCLA imposes liability on "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances . . . owned or possessed by such person . . . ." 42 U.S.C. § 9607(a)(3). For arranger liability to attach, a person must both "own[] or possess[]" hazardous substances and "arrange[] for" their disposal or treatment. *Id.* "CERCLA does not define the phrase 'arranged for.'" *South Florida Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996) (internal citations omitted); *see also United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996) (same); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (same), *cert. denied*, 510 U.S. 1044 (1994). CERCLA's legislative history provides little guidance in determining the meaning of these words. *Montalvo*, 84 F.3d at 406 n. 6; *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 n. 8 (8th Cir. 1989). "Congress has left

1. Uniroyal presented this issue in its related petition for a writ of certiorari docketed in this Court as Case No. 06-853.

this task to the courts, and the courts have at times struggled with the contours of 'arranger liability' under § 107(a)(3)." *Montalvo*, 84 F.3d at 406.

The parties stipulated that Uniroyal exercised no control over the manufacture of 2,4,5-T or over the operation of the Vertac site. The District Court found that "Uniroyal was in no position to manage the disposal of any hazardous materials." *Vertac*, 79 F. Supp.2d at 1040. Nonetheless, both the District Court and the Court of Appeals held Uniroyal liable as an arranger, reasoning that Uniroyal owned the TCB throughout Vertac's manufacturing process and that control is not "necessary" to expose a person to arranger liability. *Vertac*, 966 F. Supp. at 1501; *Hercules*, 247 F.3d at 720. The holding that control is unnecessary conflicts with the plain language of § 107(a)(3), which requires that a person both "owned or possessed" the hazardous substances and "arranged for" their disposal or treatment. *See Morton Intern., Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 676-77 (3d Cir. 2003). The Court of Appeals read the words *arranged for* out of § 107(a)(3) and rendered this central language of the statute superfluous.

The Courts of Appeals have adopted differing standards for the imposition of CERCLA arranger liability. The Third Circuit recognized:

> Almost all of our sister circuit courts have adopted a standard for "arranger liability," but the standards adopted vary. *See Geraghty and Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 929 (5th Cir. 2001), *cert. denied*, 533 U.S. 950, 121 S.Ct. 2592, 150 L.Ed.2d 751 (2001); *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999); *Pneumo Abex Corp. v. High Point, Thomasville and Denton R.R. Co.*, 142 F.3d 769, 775 (4th Cir.

> 1998); *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227, 1231-32 (6th Cir. 1996); *South Florida Water Management District v. Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996); *Amcast Industrial Corporation v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993); *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 695 (9th Cir. 1992); *United States v. Aceto Agricultural Chems. Corp.*, 872 F.2d 1373, 1381-82 (8th Cir. 1989).

Morton, 343 F.3d at 676-77.

Even before the decisions below, the Eighth Circuit had advanced the most liberal interpretation of the words *arranged for*. *See Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1523 (D. Colo. 1996) (citing *Aceto*, 872 F.2d at 1378-82). In *Aceto*, the Court of Appeals emphasized that, because of an allegation of ownership, it was reasonable to infer from the complaint that the defendants had the authority to control the waste-disposal practices at issue. 872 F.2d at 1383. However, in the case at bar, the Court of Appeals discounted the importance of that conclusion. Despite the fact that, in *Aceto*, there was no meaningful difference between the CERCLA claim and the claim under the Resource Conservation and Recovery Act, 42 U.S.C. § 6973 *et seq.* ("RCRA"), the Court of Appeals below reasoned:

> Although we stated in *Aceto* that "it may be reasonably inferred that [defendants] had the authority to control the way in which the pesticides were formulated," . . . this observation came as part of our discussion of RCRA and was not necessary to our prior conclusion that the complaint stated a valid claim under CERCLA. Indeed, in the portion of *Aceto* that discussed

> CERCLA, we specifically rejected the defendants' contention that control is required in every circumstance. To support their argument, the defendants in *Aceto* quoted *NEPACCO*, 810 F.2d at 743, for the proposition that they should "escape liability because they had no authority to control" the formulation and disposal process .... We distinguished *NEPACCO* by observing that a finding of control had been necessary in that case only because ownership was lacking .... The *Aceto* defendants, however, unlike those in *NEPACCO*, "actually owned the hazardous substances, as well as the work in process," ... and thus an arguable absence of control did not mandate dismissal of the complaint. Control, therefore, is not a necessary factor in every case of arranger liability ....

Hercules, 247 F.3d at 720 (internal citations omitted).

Holding that the imposition of arranger liability does not require a finding of control, the Court of Appeals departed from its earlier interpretation of CERCLA arranger liability. The Court of Appeals had unequivocally stated,

> We agree ... that, in the wake of [*United States v. Gurley*, 43 F.3d 1188 (8th Cir.1994),] and [*United States v. Vertac Chemical Corporation*, 46 F.3d 803 (8th Cir. 1995)], a finding of arranger liability requires some level of actual participation in, or exercise of control over, activities that are causally connected to, or have some nexus with the arrangement for disposal of hazardous substances or the off-site disposal itself.

United States v. TIC Inv. Corp., 68 F.3d 1082, 1087-88 (8th Cir. 1995). Indeed, in an earlier appeal in this very case, the Court of Appeals held that the United States Department of Defense was not liable for any response costs because it did not control the disposal of hazardous substances. *Vertac*, 46 F.3d at 809. The Court of Appeals' current standard for arranger liability, as articulated below, reaches much further than these earlier cases.

Numerous Courts of Appeals have rejected the Eighth Circuit's approach. At the other end of the spectrum, the United States Court of Appeals for the Second Circuit held:

> Congress employed traditional notions of duty and obligation in deciding which entities would be liable under CERCLA as arrangers for the disposal of hazardous substances. Accordingly, this court concludes that it is the *obligation* to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision.

General Elec. Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 286 (2d Cir. 1992) (emphasis in original). The Second Circuit observed that "courts have found that ownership of hazardous substance, when combined with actual control over the process that generates the hazardous waste, supports arranger liability." *Id.* at 287. In the Second Circuit, even "the opportunity or ability to control a third-party's waste disposal practices" does not suffice to hold a person "liable as an entity that 'otherwise arranged for' disposal or transport of hazardous waste." *Id.* at 286. The United States Court of Appeals for the Fifth Circuit cited the Second Circuit's opinion with approval. *See Geraghty and Miller, Inc. v.*

Conoco, Inc., 234 F.3d 917, 929 (5th Cir. 2000), *cert. denied*, 533 U.S. 950 (2001).

Likewise, the United States Court of Appeals for the Third Circuit has explained, "Ownership or possession of the hazardous substance must be demonstrated, but this factor alone will not suffice to establish liability. A plaintiff must also demonstrate either control over the process that results in a release of hazardous waste or knowledge that such a release will occur during the process." *Morton,* 343 F.3d at 677-78.

Using the Eighth Circuit's earlier cases, the United States Court of Appeals for the Ninth Circuit expressed its view as follows:

> To summarize our view of *Aceto* and *NEPACCO*, and to assess the interrelationship of the factors of ownership, possession, and control over waste disposal, we can do no better than to quote from Judge Levi's careful opinion in *United States v. Iron Mountain Mines, Inc.*, 881 F.Supp. 1432 (E.D. Cal. 1995). He writes:
>
> > It is true that some cases impose arranger liability on parties who did not literally own or physically possess hazardous waste at the time it was disposed of or released. But in each of these cases the party either was the source of the pollution or managed its disposal by the arranger [citing numerous cases, including *Aceto* and *NEPACCO*].
> >
> > No court has imposed arranger liability on a party who never owned or

> possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue. *See, e.g., General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) ("it is the obligation to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision") (emphasis in original).

United States v. Shell Oil Co., 294 F.3d 1045, 1058-59 (9th Cir. 2002).

The United States Court of Appeals for the Eleventh Circuit interpreted the Eighth Circuit's decision in *Aceto* as Uniroyal did. The Eleventh Circuit rejected the plaintiffs' reliance on *Aceto* in *South Florida Water Management District v. Montalvo*, 84 F.3d 402 (11th Cir. 1996). The *Montalvo* panel noted that, in *Aceto*, the Eighth Circuit had concluded that "it was possible to infer the manufacturers exercised some control over the formulator's mixing process." *Id.* at 408. The Eleventh Circuit found that the *Montalvo* plaintiffs had not alleged that the defendants "had sufficient knowledge of or control over plaintiffs' disposal practices to be held liable" as "arrangers" for the disposal of hazardous substances. *Id.* at 409. And the United States Court of Appeals for the Eleventh Circuit has ruled,

> If Congress wishes to impose liability on parties who contract for services that produce hazardous waste, it, not us, has the authority to do so. We emphasize, however, that our opinion does not

> foreclose the possibility that a party could so control and benefit from another company's production of hazardous waste that arranger liability would arise under 42 U.S.C. § 9607(a)(3).

Concrete Sales and Servs., Inc. v. Blue Bird Body Co., 211 F.3d 1333, 1339 (11th Cir. 2000). *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) ("The words ['arranged for'] imply intentional action. The only thing that Detrex arranged for Transport Services to do was to deliver TCE to Elkhart's storage tanks. It did not arrange for spilling the stuff on the ground."), *cert. denied*, 510 U.S. 1044 (1994).

The United States Court of Appeals for the Tenth Circuit applied this Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998), which defined the standard for "operator liability" to require one to "manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations," to cases involving arranger liability. *Raytheon Constructors, Inc. v. Asarco, Inc.*, 368 F.3d 1214, 1217 (10th Cir. 2003).

If the United States had brought this case in the Second, Third, Fifth, Seventh, Ninth, Tenth, or Eleventh Circuit, Uniroyal likely would not have been held liable under CERCLA as one that "arranged for" the disposal or treatment of hazardous substances. At the same time, in addition to the Eighth Circuit, the United States Court of Appeals for the Sixth Circuit imposes arranger liability in the absence of a finding of control. The Sixth Circuit held that "a party can be responsible for 'arranging for' disposal, even when it has no control over the process leading to the release of substances." *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1232 (6th Cir. 1996). The appropriate inquiry,

according to the Sixth Circuit, "is whether the party intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances." *Id.* at 1231.

The Courts of Appeals' differing standards for the imposition of CERCLA arranger liability generate confusion and inequity in the marketplace. While the Second Circuit requires an obligation to control the disposal or treatment of hazardous substances to impose arranger liability, the Eighth Circuit held Uniroyal liable as an arranger despite the absence of even the opportunity to control the disposal or treatment of hazardous substances. Liability for environmental cleanup costs is often staggering: Here, the judgment potentially exposes Uniroyal to liability for over $110 million. This Court should resolve the split among the Circuit Courts of Appeals and provide a uniform standard for the imposition of CERCLA arranger liability.

II. The Court Of Appeals' Opinion Imposes Unforeseeable Joint-And-Several Liability For Over $110 Million Based On Lawful, Non-Negligent Conduct Involving Only About $1.5 Million In Transactions In Violation Of The Fifth Amendment To The United States Constitution.[2]

The Court of Appeals rejected Uniroyal's as-applied challenge to CERCLA's constitutionality on the ground that it had previously rejected challenges to CERCLA's constitutionality. *Vertac*, 453 F.3d at 1047-48. The Court of Appeals ruled that the retroactive application of CERCLA is never unconstitutional, even when a retroactive application imposes severe liability on a limited class of parties that could not have anticipated the liability and the liability is substantially disproportionate to the parties' experience and settled expectations.

2. Uniroyal presented this issue in its related petition for a writ of certiorari docketed in this Court as Case No. 06-853.

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). The retroactive application of legislation that imposes unexpected, severe, and disproportionate liability violates the Fifth Amendment to the United States Constitution. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf*, 511 U.S. at 265. The "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Id.* (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). CERCLA does not expressly provide for retroactivity, and Uniroyal's activities giving rise to CERCLA liability in this case predated CERCLA and were lawful and non-negligent. Nonetheless, Uniroyal was unexpectedly held jointly and severally liable for over $110 million in CERCLA response costs.

In *Eastern Enterprises*, this Court held the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701-22, unconstitutional as applied to impose retroactive liability on a company to pay health benefits to over 1,000 of its former employees. Although there was no single opinion for the Court, Justice O'Connor, writing for a plurality that included Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, distilled three factors of "particular significance" from prior cases: "The economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Eastern Enters.*, 524 U.S. at 523; *see also Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979). The plurality opined that, while several prior cases had upheld retroactive statutes, their imposition of retroactive liability

was "confined to short and limited periods required by the practicalities of producing national legislation." *Eastern Enters.*, 524 U.S. at 526. The plurality concluded that the Takings Clause of the Fifth Amendment forbids the application of a statute in a particular case if the law "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and [if] the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 528-29.

Justice Kennedy, concurring in the judgment and dissenting in part, agreed that the Coal Act, as applied to Eastern Enterprises, was arbitrary and therefore unconstitutional. Justice Kennedy rested his decision on the Due Process Clause of the Fifth Amendment rather than on the Takings Clause. That said, Justice Kennedy stated that he was "in full accord with many of the plurality's conclusions[.]" *Id.* at 539. He agreed that "[t]he plurality's careful assessment of the history and purpose of the statute in question demonstrates the necessity to hold it arbitrary and beyond the legitimate authority of the Government to enact." *Id.*

The four dissenters likewise recognized that retroactive application of a federal statute may be unconstitutional under the Due Process Clause of the Fifth Amendment. The dissenters explained that, "like the plurality," they "would inquire if the law" as applied retroactively was "fundamentally unfair or unjust." *Id.* at 558 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting). "[T]he Due Process Clause can offer protection against legislation that is unfairly retroactive[,] for . . . a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary." *Id.* at 557. The dissent noted that the same three factors articulated by the plurality could properly be applied in the due process, rather than takings, context.

Id. (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986)). The dissenters concluded that, on the facts before them, retroactive application of the Coal Act to Eastern Enterprises was not fundamentally unfair or unjust. But every Justice in *Eastern Enterprises* agreed with the core proposition that "an unfair retroactive assessment of liability upsets settled expectations, and . . . thereby undermines a basic objective of law itself." *Id.* at 558 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *compare id.* at 532 (plurality) ("Retroactivity is generally disfavored in the law, in accordance with fundamental notions of justice that have been recognized throughout history") (internal quotation marks and citations omitted); *id.* at 547 (Kennedy, J., concurring in the judgment) ("for centuries our law has harbored a singular distrust of retroactive statutes").

Some courts, including the Court of Appeals below in one opinion, have recognized that *Eastern Enterprises* can provide a basis to challenge a retroactive application of CERCLA. *See, e.g., Hercules*, 247 F.3d at 722 (stating that "inquiry into the constitutionality of CERCLA . . . would be 'essentially ad hoc and fact intensive'") (quoting *Eastern Enterprises*); *Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp.2d 1094, 1111 (D. Idaho 2003) ("Defendants' argument that the retroactive application of CERCLA in this case is a taking or in violation of the due process clause of the Constitution as discussed in *Eastern Enterprises* [] is reserved until the dollar amount of the damages is established in the second phase of the trial."). Other courts have refused to apply *Eastern Enterprises* to evaluate the constitutionality of the retroactive application of CERCLA on the ground that the decision has no precedential effect. *See, e.g., United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) ("The only binding aspect of [*Eastern Enterprises*] is its specific result, and so the authority of *Eastern Enterprises* is confined to its holding that the Coal Act is unconstitutional as applied to Eastern Enterprises."); *Franklin County Conv.*

Facilities v. American Premier, 240 F.3d 534, 552 (6th Cir. 2001) (holding that "*Eastern Enterprises* has no precedential effect [on the retroactive application of CERCLA] because no single rationale was agreed upon by the Court").

The judgment in this case holds Uniroyal jointly and severally liable for over $110 million in response costs as a result of lawful, non-negligent conduct involving only $1.5 million in transactions. As the District Court recognized, "Uniroyal and Hercules are left 'holding the bag' for Vertac, who at least arguably caused the greatest amount of harm." *Vertac*, 79 F. Supp.2d at 1036. Retroactive application of CERCLA can result in this sort of large-scale, unexpected liability and thereby undermine the "free, dynamic society" that is "fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 266. The Court of Appeals' ruling that the retroactive application of CERCLA is never susceptible to an as-applied constitutional challenge fails to address this Court's opinion in *Landgraf* and directly contradicts the views of all the Justices of this Court in *Eastern Enterprises*. This Court should decide whether the retroactive application of CERCLA can violate the Constitution and whether it does so as to Uniroyal in this case.

III. The Court of Appeals' Opinion Endorses EPA's Use Of Its Cancer Potency Factor For Dioxin As A Legislative Rule Without Providing Notice And The Opportunity To Comment In Conflict With § 553 Of The Administrative Procedure Act And Decisions Of Other Courts Of Appeals.[3]

The Administrative Procedure Act (the "APA") requires notice and the opportunity to comment before an agency can

3. Discussion of the Administrative Procedure Act in this section is borrowed and adapted from Hercules' petition for a writ of certiorari docketed in this Court as Case No. 06-865.

make a rule. 5 U.S.C. §§ 553(b), (c). In this case, EPA has created and applied its standard potency factor at every site requiring dioxin-affected remediation for the last 25 years. EPA considered its standard potency factor to be a rule in that it affirmatively stated that it would be "arbitrary and capricious" for EPA not to apply its standard potency factor. Thus, EPA summarily rejected all alternative potency factors proposed by affected parties. The Eighth Circuit held that EPA was exempt from the notice-and-comment requirements of the APA because EPA's potency factor was "at most only a technical and advisory report." *Vertac*, 453 F.3d at 1046.

The Eighth Circuit's decision is inconsistent with administrative law rulings in other circuits holding that an agency's uniform and inflexible practice creates a legislative rule and triggers the need for notice-and-comment rulemaking. The Eighth Circuit's reasoning that an agency can avoid rulemaking by purporting to consider comments, and then invariably reject them as contrary to agency policy, is inconsistent with this Court's admonition that "it is the substance of what the [agency] has purported to do and has done which is decisive." *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942).

The D.C. Circuit has explained that, if an agency "will automatically decline to entertain challenges to the statement's position, then the statement is binding." *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988). In *McLouth,* the D.C. Circuit rejected EPA's assertion that it did "not consider itself . . . bound" by a model used to predict levels of hazardous waste and that it "retained discretion to deviate from its use." *Id.* (internal quotation marks and citation omitted). The D.C. Circuit held that agency practice proved otherwise and that EPA had created a legislative rule requiring rulemaking. "More critically than EPA's language adopting the model, its later conduct applying

it confirms its binding character." *Id.* at 1321. The D.C. Circuit noted that EPA was "close-minded and dismissive in its denial of a delisting petition"; "the model is not just a 'musing[] about what the [agency] might do in the future'"; "EPA was simply unready to hear new argument"; and "EPA has evidenced almost no readiness to reexamine the basic propositions that make up the" model. *Id.* (citations omitted; brackets in original). The D.C. Circuit concluded that "[t]he model thus created a norm with 'present-day binding effect,'" even though EPA pointed to four out of 100 cases where it deviated from the model. *Id.* at 1321.

Similarly, the D.C. Circuit rejected an agency's claim that a schedule of penalties was a mere "policy statement" because the agency's practice showed that it "intend[ed] to use that framework to cabin its discretion." *United States Tel. Ass'n v. FCC*, 28 F.3d 1232, 1233 (D.C. Cir. 1994). The court explained that a "policy statement" is merely "an indication of an agency's current position on a particular regulatory issue." *Id.* The court noted that "[t]he schedule of fines has been employed in over 300 cases and only in 8 does the Commission even claim that it departed from the schedule." *Id.* It was therefore a rule. Other Courts of Appeals agree. *Jerri's Ceramic Arts v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 208 (4th Cir. 1989) ("[T]he Commission has made a legislative rule and called it an interpretation."); *Nat'l Knitwear Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 666 F.2d 81, 83 (4th Cir. 1981) (holding that an agency's "characterization of its statement as an exposition of its policy or interpretation of the standard does not preclude our finding that it is something more.").

In *General Elec. Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002), the D.C. Circuit vacated an EPA "guidance document" with a cancer potency factor for polychlorinated biphenyls. The court held that the guidance document was a legislative

rule, not a policy statement, and therefore should have been issued only with the benefit of notice and comment as required by the APA. *Id.* at 383-85. This case involving a "guidance document" regarding the potency factor of dioxins is indistinguishable, and the Eighth Circuit's contrary ruling creates a circuit split.

EPA has used the potency factor to make a hidden policy choice and to impose over $100 billion in regulatory compliance costs across the nation. By labeling the self-enacted legislative rule as mere "guidance," EPA has evaded accountability for its policy choice, shielded itself from notice-and-comment rulemaking, and evaded judicial review. The Court should grant review to determine the lawfulness of a regulatory regime that permits EPA to set national policy without responding to public comment and judicial review.

CONCLUSION

For all these reasons, if the Court grants Hercules Incorporated's petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, the Court should also grant Uniroyal's cross-petition for a writ of certiorari.

Respectfully submitted,

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Nos. 06-853, 06-865 and 06-1014

In the Supreme Court of the United States

CHEMTURA CANADA CO./CIE,
FKA CROMPTON CO./CIE,
FKA UNIROYAL CHEMICAL LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

HERCULES INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

CHEMTURA CANADA CO./CIE,
FKA CROMPTON CO./CIE,
FKA UNIROYAL CHEMICAL LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Section 107(a)(1)-(4)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607(a)(1)-(4)(A), authorizes the United States to bring suit against various private parties, including "any person who by contract, agreement, or otherwise arranged for disposal * * * of hazardous substances owned or possessed by such person," to recover costs incurred in cleaning up contaminated property, and to proceed on a theory of joint and several liability. The petitions and conditional cross-petition present the following questions:

1. Whether the application of CERCLA to petitioners was unconstitutionally retroactive under the Fifth Amendment.

2. Whether the document setting forth the cancer potency factor that the Environmental Protection Agency used in selecting the appropriate remedial action at the contaminated site constituted a rule that should have been subject to notice and comment.

3. Whether petitioner Chemtura Canada Co./CIE was an "arranger" subject to CERCLA liability under Section 107(a)(3), 42 U.S.C. 9607(a)(3).

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ON PETITIONS AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (06-853 Pet. App. 1a-30a) is reported at 453 F.3d 1031. The opinion of the district court (06-853 Pet. App. 31a-80a) is reported at

364 F. Supp. 2d 941. An earlier opinion of the court of appeals (06-853 Pet. App. 81a-108a) is reported at 247 F.3d 706.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2006. A petition for rehearing was denied on September 19, 2006 (06-853 Pet. App. 199a). The petition for a writ of certiorari in No. 06-853 was filed on December 18, 2006. The petition in No. 06-865 was filed on December 14, 2006, and was placed on this Court's docket on December 21, 2006. The conditional cross-petition in No. 06-1014 was filed on January 22, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). The "two goals" of CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, are "to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened" and "to hold responsible parties liable for the costs of these clean-ups." H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 3, at 15 (1985).

Section 107(a) of CERCLA imposes liability for costs incurred in cleaning up contaminated property on four categories of "[c]overed persons"—typically known as potentially responsible parties (PRPs). 42 U.S.C.

9607(a). PRPs are defined as (1) owners and operators of facilities at which hazardous substances are located; (2) past owners and operators of such facilities at the time that disposal of hazardous substances occurred; (3) persons "who by contract, agreement, or otherwise arranged for disposal * * * of hazardous substances owned or possessed by such person[s]"; and (4) certain transporters of hazardous substances. See 42 U.S.C. 9607(a)(1)-(4); see also *Bestfoods*, 524 U.S. at 56 n.1 (noting that "[t]he remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup") (quoting *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion)).

Under Section 107(a)(1)-(4)(A), persons that qualify as PRPs are liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(1)-(4)(A).[1] Since the enactment of CERCLA, courts have consistently held that this language authorizes the enumerated governmental entities to bring suit against PRPs to recover their response costs, and to proceed on a theory of joint and several liability (except to the extent that PRPs can show that the alleged harm is divisible). See, *e.g.*, *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997). Another provision of CERCLA, Section 113(f)(1), provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or

[1] The national contingency plan consists of regulations prescribing the procedure for conducting cleanups under CERCLA and other federal laws. See CERCLA § 105, 42 U.S.C. 9605; 40 C.F.R. Pt. 300.

following any civil action * * * under [Section 107(a)]." 42 U.S.C. 9613(f)(1).

2. This case concerns a massive cleanup operation at a herbicide and pesticide manufacturing plant in Jacksonville, Arkansas. Petitioner Hercules Incorporated (Hercules) purchased the plant in 1961 and operated it until 1971. During that time, Hercules manufactured various herbicides. In the process of manufacturing a herbicide known as trichlorophenoxyacetic acid (2,4,5-T), Hercules generated large amounts of 2,3,7,8-tetrachlorodibenzo-p-dioxin, a type of dioxin. 06-853 Pet. App. 3a-4a. "It is undisputed that dioxin is the most acutely toxic substance yet synthesized by man." *United States* v. *Vertac Chem. Corp.*, 489 F. Supp. 870, 876 (E.D. Ark. 1980).

During its operation and ownership of the plant, Hercules released dioxin into the environment in various ways. When Hercules purchased the plant, it buried thousands of drums containing pesticide and herbicide wastes. Hazardous substances from those drums, including dioxin, leaked into a nearby creek. Until 1964, Hercules discharged dioxin-contaminated wastewater into the same creek; Hercules then installed a holding basin to allow the contaminated wastewater to be pumped into the local sewer system, but the basin did nothing to remove the dioxin and frequently overflowed during heavy rainfalls. Hercules also extracted dioxin from its herbicides by using a solvent; that process produced a waste residue that Hercules placed in drums. Hercules left those drums sitting out, sometimes for months; during that time, waste containing dioxin often leaked from the drums. 06-853 Pet. App. 4a-5a, 36a-38a.

In 1971, Vertac Chemical Corporation (Vertac) leased the plant from Hercules; in 1976, Vertac pur-

chased it. Vertac continued to manufacture herbicides, including 2,4,5-T, and, in doing so, continued to generate dioxin. Like Hercules, Vertac stored drums containing dioxin-contaminated waste on the site. 06-853 Pet. App. 5a-6a, 39a.

Petitioner Chemtura Canada Company/CIE (Chemtura), then known as Uniroyal Chemical Limited, entered into an agreement with Vertac under which Vertac would formulate more than a million pounds of 2,4,5-T. In connection with that agreement, Chemtura supplied Vertac with 1,2,4,5-tetrachlorobenzene (TCB), a hazardous substance that was the key ingredient of 2,4,5-T. Chemtura had imported the TCB pursuant to temporary import bonds, in which it had declared that it was bringing the TCB into the country solely for processing and that it owned, and would continue to own, the TCB during the entire time it was in the country. Chemtura required Vertac to store the TCB separately and to provide insurance for it while it was stored at the site. In entering into the arrangement with Vertac, Chemtura understood, and the agreement specifically provided, that some of the TCB would be lost through waste and spillage and that the process for manufacturing 2,4,5-T from the TCB would generate dioxin that would require disposal. 06-853 Pet. App. 39a, 87a-88a, 169a-171a.

In 1979, Vertac stopped manufacturing 2,4,5-T. In 1980, the Environmental Protection Agency (EPA) issued a rule prohibiting Vertac from disposing of wastes contaminated with dioxin. 45 Fed. Reg. 32,676. Vertac continued to accumulate drums of waste from its production of herbicides. In 1987, Vertac abandoned the site; by that time, nearly 29,000 drums of waste were stored there. In conjunction with the Arkansas Department of

Pollution Control and Ecology, EPA undertook remediation efforts at the site (and at adjoining locations and two area landfills). 06-853 Pet. App. 6a-8a, 10a, 39a-43a, 46a.

3. As is relevant here, the United States filed suit against petitioners in the Eastern District of Arkansas, seeking to recover the costs of cleaning up the Jacksonville site (and the associated locations) under Section 107(a)(1)-(4)(A) of CERCLA. See 42 U.S.C. 9607(a)(1)-(4)(A).[2] The government alleged that Hercules was jointly and severally liable as an owner and operator of the Jacksonville facility at the time that disposal of dioxin occurred, see CERCLA § 107(a)(2), 42 U.S.C. 9607(a)(2), and as an "arranger" of the disposal of hazardous substances, see CERCLA § 107(a)(3), 42 U.S.C. 9607(a)(3). The government also alleged that Chemtura was jointly and severally liable as an "arranger." Petitioners brought cross-claims against each other for contribution under Section 113(f)(1). See 42 U.S.C. 9613(f)(1).

In 1993, the district court granted summary judgment to the government on its claim against Hercules, concluding that Hercules was jointly and severally liable both as an owner and operator under Section 107(a)(2) and as an "arranger" under Section 107(a)(3) and further concluding that Hercules had failed to show that the harm was divisible. 06-853 Pet. App. 9a, 90a. In 1997, after trial before an advisory jury, the district court determined that Chemtura was liable as an "ar-

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[2] The government also brought suit against various other parties, including Vertac. Vertac ultimately agreed to pay $10.7 million toward the cleanup of the site, and its shareholders agreed to pay an additional $3.15 million. *United States* v. *Vertac Chem. Corp.*, 756 F. Supp. 1215, 1217 (E.D. Ark. 1991), aff'd, 961 F.2d 796 (8th Cir. 1992).

ranger" under Section 107(a)(3). *Id.* at 154a-198a. The district court based that determination on its findings that (1) Chemtura owned the TCB it supplied to Vertac; (2) Chemtura retained an ownership interest in the TCB during its processing; (3) Chemtura owned the 2,4,5-T that was produced; (4) the generation of hazardous substances was "inherent" during the processing of the TCB; and (5) the processing by Vertac resulted in the release of hazardous substances. *Id.* at 177a.

The district court subsequently granted summary judgment to the government on the amount of costs it sought to recover from petitioners. 06-853 Pet. App. 109a-153a. As is relevant here, the district court rejected Hercules' claim that it should not have been liable for the cleanup costs associated with a nearby landfill site on the ground that the document that set forth the cancer potency factor used by EPA to calculate the risk from dioxin at the site constituted a rule that should have been subject to notice and comment. *Id.* at 129a-130a. The court reasoned that the document was "at most only a technical and advisory report," *id.* at 130a; that EPA's regional administrator "exercised discretion in deciding whether to apply the cancer potency factor to the cleanup of the site," *ibid.*; and that Hercules "had the opportunity to, and did, comment on EPA's application of the cancer potency factor with regard to cleanup levels at the site," *id.* at 131a.

The district court entered judgment in favor of the government against petitioners in the common amount of approximately $89 million (plus subsequent response costs and post-judgment interest). *United States* v. *Vertac Chem. Corp.*, 79 F. Supp. 2d 1034, 1035 (E.D. Ark. 1999). With regard to petitioners' contribution claims, the district court allocated 97.4% of the common

amount to Hercules and 2.6% to Chemtura, subject to offsets from any other PRPs. *Id.* at 1041.

4. On appeal, Chemtura contended, *inter alia*, that the district court erred by holding that it was liable as an "arranger" under Section 107(a)(3); Hercules contended, *inter alia*, that the district court erred by holding that it had failed to show that the harm was divisible. The court of appeals affirmed the judgment of liability against Chemtura, but reversed and remanded the judgment of liability against Hercules on the issue of divisibility. 06-853 Pet. App. 81a-108a.

With regard to Chemtura's argument, the court of appeals explained that, "[i]n deciding questions of arranger liability, we do not rely on bright-line rules but look to the totality of the circumstances to determine whether the facts of a given case fit within CERCLA's overwhelmingly remedial scheme." 06-853 Pet. App. 105a-106a (internal quotation marks and citation omitted). The court reasoned that this case was "nearly identical" to *United States* v. *Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), in which it had declined to dismiss a similar CERCLA complaint. 06-853 Pet. App. 103a. The court of appeals observed that "[c]ontrol * * * is not a necessary factor in every case of arranger liability," *id.* at 104a; that the district court did not clearly err by finding that Chemtura owned the TCB throughout its processing, *id.* at 105a; and that, even if Chemtura had technically sold the TCB to Vertac, it was appropriate to "look beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance," *id.* at 106a (citation omitted).

With regard to Hercules's argument, the court of appeals concluded that the district court had applied the

incorrect legal standard in determining that Hercules had failed to show that the harm was divisible. 06-853 Pet. App. 100a-102a.

5. Chemtura filed a petition for a writ of certiorari, renewing its claim that it should not have been held liable as an "arranger" under Section 107(a)(3). See Pet. at 5-12, *Crompton Co./CIE* v. *United States*, No. 01-387. This Court denied review. 534 U.S. 1065 (2001).

6. On remand, after a lengthy evidentiary hearing, the district court again determined that Hercules had failed to show that the harm was divisible, except with regard to the harm caused at another nearby landfill site. 06-853 Pet. App. 31a-80a. As is relevant here, the district court rejected Hercules' contention that the application of CERCLA would be unconstitutionally retroactive under the Fifth Amendment because Hercules' liability would be "severe, unexpected, and grossly disproportionate to Hercules' conduct." *Id.* at 77a. The district court reasoned that "[t]he Eighth Circuit has previously held CERCLA to be constitutional," *id.* at 78a, and that other courts had consistently reached the same conclusion, both before and after this Court's decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). 06-853 Pet. App. 78a. Accordingly, the district court concluded that "the application of CERCLA to hold Hercules liable in this instance is not unconstitutional." *Ibid.* After subtracting the costs associated with the excluded landfill site, the court subsequently reentered final judgment in favor of the government in the common amount of approximately $110 million (plus subsequent response costs and post-judgment interest). *Id.* at 10a.

7. The court of appeals affirmed. 06-853 Pet. App. 1a-30a.

The court of appeals first rejected various claims by Hercules, including challenges to the district court's determination that Hercules had mostly failed to show that the harm was divisible. 06-853 Pet. App. 11a-28a. As is relevant here, the court rejected Hercules' claim that it should not have been liable for the cleanup costs associated with the nearby landfill site on the ground that the document that set forth the cancer potency factor used by EPA to calculate the risk from pollution at the site constituted a rule that should have been subject to notice and comment. *Id.* at 25a-27a. The court of appeals agreed with the district court that the document was "at most a technical and advisory report * * * [and] did not obligate the agency or public in determining acceptable risks associated with dioxin," *id.* at 26a (citation omitted), and that "EPA considered Hercules' comments on the EPA's application of the cancer potency factor with regard to the cleanup levels at the site and responded to the comments in the final [records of decision]," *ibid.*

The court of appeals also rejected Chemtura's claim that it should not have been held liable as an "arranger" under Section 107(a)(3). 06-853 Pet. App. 29a. The court reasoned that it had addressed that issue in its previous opinion and that, because Chemtura had "pointed to no new controlling authority," its previous opinion was binding as the law of the case. *Ibid.*

Finally, the court of appeals rejected petitioners' claims that the application of CERCLA was unconstitutionally retroactive under the Fifth Amendment. 06-853 Pet. App. 29a-30a. The court reasoned that it had "previously resolved this exact issue" in *United States* v. *Dico, Inc.*, 266 F.3d 864 (8th Cir. 2001), cert. denied, 535 U.S. 1095 (2002), in which it had held, in the wake of this

Court's decision in *Eastern Enterprises*, that the application of CERCLA was not unconstitutionally retroactive. 06-853 Pet. App. 29a.

ARGUMENT

Petitioners contend (06-853 Pet. 15-19; 06-865 Pet. 13-24; 06-1014 Pet. 16-20) that the court of appeals erred by holding that the application of CERCLA was not unconstitutionally retroactive under the Fifth Amendment. Petitioners further contend (06-865 Pet. 24-30; 06-1014 Pet. 20-23) that the court of appeals erred by holding that the document that set forth the cancer potency factor used by the Environmental Protection Agency (EPA) in selecting the appropriate remedial action for the landfill site did not constitute a rule that should have been subject to notice and comment. In its petition (and in its conditional cross-petition to Hercules' petition), Chemtura also contends (06-853 Pet. 7-15; 06-1014 Pet. 8-16) that the court of appeals erred by holding that it was subject to CERCLA liability as an "arranger" under Section 107(a)(3). None of those contentions warrants further review.

1. Petitioners claim (06-853 Pet. 15-19; 06-865 Pet. 13-24; 06-1014 Pet. 16-20) that the court of appeals erred by holding that the application of CERCLA was not unconstitutionally retroactive under the Fifth Amendment. That claim lacks merit.

a. Petitioners do not assert that the court of appeals' decision conflicts with any decision of another court of appeals concerning the application of CERCLA. Nor could they, because, as the courts below noted (06-853 Pet. App. 29a, 106a-108a), the courts of appeals have consistently rejected retroactivity challenges to CERCLA. See *United States* v. *Alcan Aluminum*

Corp., 315 F.3d 179, 189-190 (2d Cir. 2003), cert. denied, 540 U.S. 1103 (2004); *United States* v. *Dico, Inc.*, 266 F.3d 864, 880 (8th Cir. 2001), cert. denied, 535 U.S. 1095 (2002); *Franklin County Convention Facilities Auth.* v. *American Premier Underwriters, Inc.*, 240 F.3d 534, 550-552 (6th Cir. 2001); *United States* v. *Olin Corp.*, 107 F.3d 1506, 1511-1515 (11th Cir. 1997); *O'Neil* v. *Picillo*, 883 F.2d 176, 183 & n.12 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990); *United States* v. *Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). Although petitioners assert (06-853 Pet. 19; 06-865 Pet. 18-20) that they were challenging the constitutionality of CERCLA only on an as-applied basis, they offer no explanation for how their claims differ from the claims that were considered, and rejected, in those cases.

b. Petitioners' primary contention is that the court of appeals' decision conflicts with this Court's decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). That contention is unfounded.

In *Eastern Enterprises*, this Court considered a challenge to the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act), 26 U.S.C. 9701-9722. The Coal Act established a multi-employer lifetime health-benefit plan for coal miners, financed by annual premiums assessed against coal operators that had previously signed national wage agreements requiring contributions to benefit plans. *Eastern Enterprises*, 524 U.S. at 514-515 (plurality opinion). The plaintiff had operated a coal mine and signed national wage agreements, but ceased coal mining operations in 1966, before national wage agreements establishing lifetime health benefits had been signed. *Id.* at 515-516. Under the Coal Act, the plaintiff was obligated to pay premiums to cover the

health benefits of more than 1000 retired miners or their dependents who had worked for the company before 1966. *Id.* at 517. The plaintiff contended that the Coal Act violated substantive due process as applied to it, and effected an unconstitutional taking of its property without just compensation, by retroactively creating an obligation to finance the benefits of miners who, when employed by the plaintiff, had no expectation that they would receive lifetime health-care benefits at the plaintiff's expense. *Id.* at 517, 531.

The Court held that the application of the Coal Act to the plaintiff violated due process. A plurality of four Justices concluded that the application of the Coal Act effected an unconstitutional taking without just compensation. See *Eastern Enterprises*, 524 U.S. at 534-537. Applying a three-factor test drawn from the Court's regulatory-taking cases, the plurality concluded that, as applied to the plaintiff, the Coal Act had a substantial economic impact, interfered with reasonable investment-backed expectations, and constituted an unusual government action. *Id.* at 529-537. The plurality did not address the plaintiff's claim that the Coal Act violated substantive due process. *Id.* at 537-538. Justice Kennedy concurred in the judgment and dissented in part. He disagreed with the plurality's conclusion that the Coal Act should be analyzed as a taking, *id.* at 539-547, but concluded that the application of the Coal Act to the plaintiff violated substantive due process because the plaintiff "was not responsible for [the coal miners'] expectation of lifetime health benefits," which "was created by promises and agreements made long after [the plaintiff] left the coal business," *id.* at 550. Justice Breyer, joined by three other Justices, dissented. He also disagreed with the plurality's conclusion that the

Coal Act should be analyzed as a taking, *id.* at 554-559, but concluded that the application of the Coal Act to the plaintiff did not violate substantive due process because it was "not fundamentally unfair for Congress to impose upon [the plaintiff] liability for the future health care costs of miners whom it long ago employed," *id.* at 566.

Hercules contends (06-865 Pet. 14-18) that the court of appeals was *required* to analyze petitioners' claim under the three-factor test for analyzing regulatory taking claims applied by the plurality in *Eastern Enterprises*—and that, if it had, it would have concluded that the application of CERCLA to petitioners was unconstitutional. Far from commanding a majority of the Court in *Eastern Enterprises*, however, that mode of analysis was expressly rejected by five Justices. See 524 U.S. at 539-547 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-559 (Breyer, J., joined by Stevens, Souter and Ginsburg, JJ., dissenting). Instead, to the extent that a common principle emerges from the opinions supporting the judgment in *Eastern Enterprises*, it is that the application of the Coal Act to the plaintiff was constitutionally problematic because the plaintiff had left the coal industry before any collective bargaining agreement gave miners an expectation of lifetime health-care benefits. See *id.* at 530-531, 532, 535-536 (plurality opinion); *id.* at 549-550 (Kennedy, J., concurring in the judgment and dissenting in part).

When judged against that principle, the application of CERCLA to potentially responsible parties such as petitioners is fundamentally distinguishable from the application of the Coal Act in *Eastern Enterprises*, because there is a much closer nexus between the conduct of a potentially responsible party and the costs that are being imposed on it (which, in an action under Section

107(a)(1)-(4)(A), are costs incurred by the government in remediating harms from contamination for which the party is determined to be responsible). As one court of appeals has explained, "the background and purpose of the [Coal Act] differs greatly from that of CERCLA," because "Congress intended CERCLA to apply retroactively and acted purposefully to allocate the cost of hazardous waste cleanup sites to those who were responsible for creating the sites." *Dico*, 266 F.3d at 880 (internal quotation marks and citation omitted). The mere fact that a potentially responsible party may be held jointly and severally liable does not alter the analysis, especially in light of the fact that CERCLA provides mechanisms for dividing and allocating costs with other available potentially responsible parties—mechanisms that petitioners invoked in this case. See, *e.g.*, CERCLA § 113(f), 42 U.S.C. 9613(f).[3] Accordingly, even after this Court's decision in *Eastern Enterprises*, the courts of appeals have consistently concluded that the application of CERCLA to potentially responsible parties is not unconstitutionally retroactive. See *Alcan Aluminum Corp.*, 315 F.3d at 189-190; *Dico*, 266 F.3d at 880; *Franklin County*, 240 F.3d at 550-552.

Hercules contends (06-865 Pet. 21-23) that this Court should grant review because there is broader doctrinal uncertainty about the holding of *Eastern Enterprises*. To be sure, as Hercules notes (Pet. 21 & n.11), some

[3] Hercules repeatedly contends that the liability imposed on it was disproportionate because it was not responsible for Vertac's subsequent conduct at the Jacksonville site. See, *e.g.*, 06-865 Pet. 8-10, 16, 19 n.10. Both the district court and the court of appeals, however, rejected almost all of Hercules' claim that the harm was divisible (and that Hercules therefore should not be held liable for some portion of the costs incurred by EPA in cleaning up the site). See 06-853 Pet. App. 11a-28a, 46a-79a.

courts of appeals have concluded, after applying the analysis of *Marks* v. *United States*, 430 U.S. 188 (1977), that "no single rationale was agreed upon by the Court" in *Eastern Enterprises*. *Franklin County*, 240 F.3d at 552; see, *e.g.*, *Alcan Aluminum*, 315 F.3d at 189-190; *Anker Energy Corp.* v. *Consolidated Coal Co.*, 177 F.3d 161, 169-174 (3d Cir.), cert. denied, 528 U.S. 1003 (1999); *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1253-1258 (D.C. Cir. 1998). This case, however, would constitute a poor vehicle for resolving any such doctrinal uncertainty because, under any conceivable rationale on which a majority of the Court did agree, the application of CERCLA to potentially responsible parties such as petitioners would raise no constitutional difficulties. In any event, because there is no circuit conflict on the constitutionality of the retroactive application of CERCLA, further review on that question is unwarranted.

2. Petitioners further contend (06-865 Pet. 24-30; 06-1014 Pet. 20-23) that the court of appeals erred by holding that the document that set forth the cancer potency factor for dioxin used by the Environmental Protection Agency (EPA) in selecting the appropriate remedial action for the landfill site did not constitute a rule that should have been subject to notice and comment. That contention also lacks merit.

In general, cancer potency factors (also known as slope factors) constitute "[e]stimate[s] of the probability of response (for example, cancer) per unit intake of a substance over a lifetime." 40 C.F.R. Pt. 300, App. A, § 1.1. On a site-by-site basis, EPA uses cancer potency factors in establishing cleanup levels consistent with the national contingency plan (NCP). See 40 C.F.R. 300.430(e)(2)(i)(A)(2).

In holding that the document that set forth the cancer potency factor used by EPA in selecting the appropriate remedial action for the landfill site did not constitute a rule that should have been subject to notice and comment, the court of appeals applied the frequently cited two-part test articulated by the District of Columbia Circuit for distinguishing between legislative rules and policy statements, under which a court is required to consider (1) whether the statement at issue has binding effect and (2) whether it genuinely leaves the agency free to exercise discretion. 06-853 Pet. App. 25a-26a (citing *McLouth Steel Prods. Corp.* v. *Thomas*, 838 F.2d 1317 (D.C. Cir. 1988)). Applying that standard, the court reasoned the document was "at most a technical and advisory report * * * [and] did not obligate the agency or public in determining acceptable risks associated with dioxin," *id.* at 26a (citation omitted), and that "EPA considered Hercules' comments on the EPA's application of the cancer potency factor with regard to the cleanup levels at the site and responded to the comments in the final [records of decision]," *ibid.*

Petitioners do not contend that the court of appeals' decision to treat the document setting forth the cancer potency factor as a policy statement specifically conflicts with the decision of any other court of appeals concerning that document, nor do they contend that the court of appeals' test for distinguishing between legislative rules and policy statements more generally conflicts with the test used by any other court of appeals. Instead, petitioners seemingly contend only that the court of appeals *misapplied* that test because, "while parties were free to propose alternative potency factors, EPA announced that it would not consider them." 06-865 Pet. 24. Petitioners, however, fail to cite anything in the document

that set forth the cancer potency factor—*i.e.*, the guidance document issued by EPA in 1985—or in any other document that suggests that EPA intended that factor to be binding in all cases. The court of appeals, moreover, determined that EPA "considered Hercules's comments on the EPA's application of the cancer potency factor with regard to the cleanup levels at the site and responded to the comments in the final [records of decision]." 06-853 Pet. App. 26a. The mere fact that EPA has consistently used the same cancer potency factor (as one of many factors) "at every site at which dioxin affected remedial choices" (06-865 Pet. 24) in no way compels the conclusion that EPA has treated that cancer potency factor as binding; it could just as easily support the conclusion that the cancer potency factor is well-supported by scientific evidence (as reflected in the fact that there has been no prior litigation concerning EPA's choice of cancer potency factor). To the extent that petitioners claim that the court of appeals misapplied the test for distinguishing between legislative rules and policy statements, therefore, that claim lacks merit and in any event would not warrant further review.

3. Finally, Chemtura claims (06-853 Pet. 7-15; 06-1014 Pet. 8-16) that the court of appeals erred by holding that it was subject to CERCLA liability as an "arranger" under Section 107(a)(3). This Court denied review of that claim in an earlier petition, see Pet. at 5-12, *Crompton Co./CIE* v. *United States*, cert. denied, 534 U.S. 1065 (2001) (No. 01-387), and the same result is warranted here.

Chemtura asserts (06-853 Pet. 15) that there is a circuit conflict on the correct standard for liability as an "arranger." That assertion is incorrect. Instead, the courts of appeals have followed an intensely factual,

case-by-case approach in determining the application of "arranger" liability. They have observed that CERCLA does not define the phrase "otherwise arranged for disposal," 42 U.S.C. 9607(a)(3), and they have expressly rejected reliance on any "*per se* rule" in applying that term to the wide variety of factual situations in which it may come into play. *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 893 F.2d 1313, 1317-1318 (11th Cir. 1990).

In particular, the courts of appeals—like the court of appeals in this case, see 06-853 Pet. App. 104a—have refused to adopt a per se rule requiring a showing that the defendant controlled the disposal or treatment of hazardous substances in order to establish "arranger" liability. See, *e.g.*, *United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1232 (6th Cir. 1996); *United States* v. *TIC Inv. Corp.*, 68 F.3d 1082, 1087-1088 (8th Cir. 1995), cert. denied, 519 U.S. 808 (1996); *Catellus Dev. Corp.* v. *United States*, 34 F.3d 748, 752 (9th Cir. 1994). Instead, they have made clear that liability as an "arranger" hinges on a variety of factors peculiar to the particular transactions at issue. See, *e.g.*, *Morton Int'l, Inc.* v. *A.E. Staley Mfg. Co.*, 343 F.3d 669, 677-678 (3d Cir. 2003) (holding that "arranger" liability could be established by proof of "(1) ownership or possession; and (2) knowledge; *or* (3) control") (emphasis added).

To be sure, control over (or the authority to control) the waste disposal process may take on significance in situations in which the potentially responsible parties are not involved in a close business relationship that contemplates the use and disposal of hazardous substances. For example, in *General Electric Co.* v. *AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992), the plaintiff sought to hold several oil companies

liable as entities that arranged for the disposal of waste motor oil that was stored by dealers at service stations that the dealers leased from the oil companies. The court rejected the argument that the oil companies were liable as "arrangers" simply because they had the authority to control the manner by which their dealers disposed of waste oil, reasoning that "there must be some nexus between the potentially responsible party and the disposal of the hazardous substance." *Id.* at 286. In *General Electric*, there was no relationship at all between the defendants and the entity that disposed of the hazardous substances. Under those circumstances, the court concluded, the authority to control disposal was insufficient to provide the necessary connection for "arranger" liability. *Id.* at 287-288. Critically, the court distinguished *United States* v. *Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), on the ground that "the oil companies did not own the hazardous substance, nor did they control the process by which waste motor oil was generated." *General Electric*, 962 F.2d at 287. The court therefore left open the possibility that, where, as here, the defendant retained ownership of chemicals during processing and knew that the processing of those chemicals would generate hazardous waste, the defendant could be liable as an "arranger" under Section 104(a)(3).

Similarly, in *South Florida Water Management District* v. *Montalvo*, 84 F.3d 402 (11th Cir. 1996), pesticide sprayers who had spilled hazardous chemicals on and around their airstrip filed a third-party complaint against the landowners who had contracted for their services. The court determined that the relationship between the sprayers and the landowners did not form a basis for "arranger" liability because "the Sprayers

have simply not alleged the Landowners had sufficient knowledge of *or* control over the Sprayers' disposal practices to be held liable." *Id.* at 409 (emphasis added). The court reaffirmed that courts must "reject[] any attempt to substitute a *per se* rule for the phrase 'arranged for,'" and should instead "focus on all of the facts in a particular case." *Id.* at 407. And like the Second Circuit in *General Electric*, the court determined that the instant case was distinguishable from *Aceto* because, "[i]n *Aceto*, the mixing and packaging of pesticides 'inherently' involved the creation of hazardous wastes such that the manufacturers should have expected the formulator would have to dispose of these wastes as part of the service they were purchasing." *Id.* at 408.

Here, the court of appeals correctly concluded that this case was analogous to *Aceto*. See 06-853 Pet. App. 103a. Like the defendants in *Aceto*, and unlike the defendants in *General Electric* or *South Florida*, Chemtura owned the pertinent hazardous materials throughout the manufacturing process and arranged for those materials to be processed in a manner that the Chemtura knew would generate wastes requiring disposal. *Id.* at 177a. Chemtura knew, moreover, that some of the hazardous materials it owned would be lost through waste and spillage. *Id.* at 170a. Chemtura thus knowingly participated in the fundamental chemical processing decisions that directly led to the improper disposal of hazardous waste. Where waste disposal is an inherent part of the process, as here and as in *Aceto*, the party who has arranged for the processing may be properly found to have arranged for the accompanying disposal of the resulting hazardous wastes. Chemtura fails to identify any conflict among the courts of appeals that warrants this Court's review.

CONCLUSION

The petitions and conditional cross-petition for writs of certiorari should be denied.

Respectfully submitted.

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Nos. 06-853 and 06-1014

In the

Supreme Court of the United States

CHEMTURA CANADA CO./CIE, fka CROMPTON CO./CIE, aka UNIROYAL CHEMICAL LIMITED,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in holding—contrary to the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits—that an entity that exercised no control over the disposal or treatment of hazardous substances, and had neither the authority nor the opportunity to control the disposal or treatment of hazardous substances, may nevertheless be held liable as one that "arranged for" the disposal or treatment of hazardous substances under § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.*

2. Whether retroactive application of § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.*, to impose unforeseeable joint-and-several liability for over $110 million based on lawful, non-negligent conduct involving only about $1.5 million in transactions violates the Fifth Amendment to the United States Constitution.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for a writ of certiorari. Written consent was granted by the counsel for all parties and lodged with the Clerk of the Court.

PLF was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation defending private property rights, economic freedom, and constitutional limitations. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF focuses particular attention to issues involving regulatory takings and the Fifth Amendment's protections afforded to private property rights. PLF attorneys represented property owners before this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and participated as amicus curiae in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). PLF attorneys have also written extensively on regulatory takings. *See, e.g.*, R.S. Radford, *Just a Flesh Wound? The Impact of* Lingle v. Chevron *on Regulatory Takings Law*, 38 Urb. Law. 437 (2006); J. David Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Preservation Council *and Its Quiet Ending in the United States Supreme Court*, 71 Fordham L. Rev. 1 (2002).

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[1] Pursuant to Supreme Court Rule 37.6, PLF affirms that no counsel for any party authored this brief in whole or in part. No person or entity, other than amicus curiae, made a monetary contribution specifically for the preparation or submission of this brief.

Because of its history and experience with regard to the Fifth Amendment's protections for private property, PLF believes its perspective will aid this Court in considering the petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The essential question posed by the petition for writ of certiorari filed by Chemtura Canada Co. (hereinafter "Uniroyal") is whether, notwithstanding the Fifth Amendment's protections of private property, Congress may impose all manner of onerous obligations and duties, substantially and retroactively restricting property rights without any significant restraint from the federal constitution. The Eighth Circuit determined that the retroactive application of some $110 million in liability against Uniroyal pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) did not violate Uniroyal's rights under the Fifth Amendment. The court of appeal reasoned that this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), had no effect on the court's existing retroactivity jurisprudence.

That position is simply not tenable. At the very least, *Eastern Enterprises* stands for the proposition that a retroactive law violating both the three-factor standard enunciated in the *Eastern Enterprises* plurality opinion and the substantive due process test set forth in Justice Kennedy's concurrence violates the Fifth Amendment. The retroactive application of CERCLA to Uniroyal undoubtedly creates the same injustice that motivated a majority of this Court in *Eastern Enterprises* to invalidate the application of the Coal Industry Retiree Health Benefit Act (Coal Act) to Eastern Enterprises. Because the Eighth Circuit entirely ignored that fact, review by this Court is merited.

Review is also merited to clarify the precise holding of *Eastern Enterprises*. Both the courts of appeals and legal commentators have struggled with reconciling the conflicting rationales of the plurality opinion and Justice Kennedy's separate concurrence. The task is challenging because the three-factor analysis explicated by Justice O'Connor, and the due process analysis conducted by Justice Kennedy, are not perfectly commensurable. But that difficulty may be avoided altogether by this Court's adoption of the jurisprudential position that the controlling rationale is that which is sufficient to sustain the Court's judgment and is joined in by the majority of the Members of the Court concurring in the judgment. According to that criterion, the *Eastern Enterprises* plurality opinion controls.

ARGUMENT

I

THE EIGHTH CIRCUIT FAILED TO DETERMINE WHETHER THE RETROACTIVE APPLICATION OF $110 MILLION IN LIABILITY AGAINST UNIROYAL VIOLATES THE LATTER'S FIFTH AMENDMENT RIGHTS UNDER *EASTERN ENTERPRISES*

The panel below determined that CERCLA did not violate Uniroyal's Fifth Amendment rights. *United States v. Vertac Chem. Corp.*, 453 F.3d 1031, 1047-48 (8th Cir. 2006). The panel expressly followed *United States v. Dico, Inc.*, 266 F.3d 864 (8th Cir. 2001). In *Dico*, the Eighth Circuit held that *Eastern Enterprises* effected no change in this Court's existing retroactivity jurisprudence, and thus concluded that uncompensated retroactive application of CERCLA is constitutional. *Id.* at 880. The *Dico* court justified its holding in part on its position that: "no single Fifth Amendment rationale commanded a majority of the Court's votes in

Eastern." *Id. Dico*'s conclusion that *Eastern Enterprises* does not set forth a binding rationale is erroneous.

A correct interpretation of *Eastern Enterprises* requires an as-applied invalidation of a retroactive statute if retroactive application would violate the three-factor test of the *Eastern Enterprises* plurality as well as the substantive due process test set forth in Justice Kennedy's concurrence. In other words, a litigant who can show that CERCLA's application to it is substantially similar in nature and effect to the Coal Act's application to Eastern Enterprises, should be entitled, under the principles of stare decisis, to a holding of unconstitutionality. This Court has already intimated as much. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 174 (2003) (citing *Eastern Enterprises* for the proposition that the Coal's Act "severe retroactive liability on certain coal companies" violates the Constitution). And at least one court of appeals has so held. *See Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999) ("*Eastern*, therefore, mandates judgment for the plaintiffs only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence.") (citing *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998)).[2]

Moreover, several commentators have interpreted *Eastern Enterprises* to have advanced and developed, to some degree, the Court's retroactivity jurisprudence. *See, e.g.*, Charles Tiefer, *Did* Eastern Enterprises *Send Enterprise Responsibility South?*, 51 Ala. L. Rev. 1305, 1325 (2000) (holding of *Eastern Enterprises* is that "highly aggravated" retroactivity violates the Fifth Amendment); Philip Jordan, Note, *Substantive Due Process Since* Eastern Enterprises, *With New Defenses Based*

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[2] *See also Mary Helen Coal Corp. v. Hudson*, 164 F.3d 624 (4th Cir. 1998) (table) (granting appellant summary reversal because the case was "materially indistinguishable from *Eastern*").

on Lack of Causative Nexus: The Superfund Example, 32 B.C. Envtl. Aff. L. Rev. 395, 404 (2005) (*Eastern Enterprises* imposes a causative nexus requirement between the liable actor and the harm); William L. Church, *The* Eastern Enterprises *Case: New Vigor for Judicial Review?*, 2000 Wis. L. Rev. 547, 565 ("For the five Justices voting against the Coal Act, there has to be a possibility that if the proper CERCLA case came before them, they would strike it down, too."); Karen S. Danahy, Comment, *CERCLA Retroactive Liability in the Aftermath of* Eastern Enterprises v. Apfel, 48 Buff. L. Rev. 509, 563 (2000) ("*Eastern Enterprises* will govern a challenge to retroactive legislation only if the specific parameters set forth by the Court can be established . . . [T]he law under scrutiny must impose a severely retroactive and disproportionate effect upon a claimant to enable a challenge to be successful."); Lisa R. Strauss, Note, *The Takings Clause as a Vehicle for Judicial Activism:* Eastern Enterprises v. Apfel *Presents a New Twist to Takings Analyses*, 16 Ga. St. U. L. Rev. 689, 728 (2000) ("While past challenges to CERCLA's constitutionality have failed, *Eastern Enterprises* opens the courthouse doors to plaintiffs who challenge the statute as applied because it declared the Coal Act's retroactive provisions unconstitutional as applied to Eastern Enterprises."); David Milton Whalin, *Is There Still Pre-1980 CERCLA Liability After* Eastern Enterprises*?*, 5 Envtl. L. 701, 720 (June 1999) ("One interpretation of *Eastern Enterprises* is that a majority of justices are willing to find that the retroactive application of a statute is impermissible when that statute reaches back beyond a particular point in time—in particular, the point before which a party had effective notice that future liability may attach to its actions."); Bruce Howard, *A New Justification for Retroactive Liability in CERCLA: An Appreciation of the Synergy Between Common and Statutory Law*, 42 St. Louis U. L.J. 847, 863 (1998) ("[T]he decision in *Eastern Enterprises* makes it clear that courts must be prepared to find that in any given case the particular facts of CERCLA liability, if enforced against an

unfortunate party to the limits of the strict, joint, several and retroactive law, will run afoul of the takings and due process clauses of the Constitution.").

Thus, the Eighth Circuit was obligated to determine whether the takings and due process tests announced in *Eastern Enterprises* had been violated. The court of appeals did no such thing. A review of those tests reveals that the Eighth Circuit's omission was significant.

A. Retroactive CERCLA Liability Likely Constitutes a Taking Under the *Eastern Enterprises* Plurality Test

Writing for the *Eastern Enterprises* plurality, Justice O'Connor explained that the Court's retroactivity analysis should be conducted using the familiar three-factor test for regulatory takings announced in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See Eastern Enterprises*, 524 U.S. at 529 (plurality opinion). Those factors are the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. *Id.* at 523-24.

Under the first factor, Uniroyal has suffered a severe economic impact by the retroactive application of CERCLA liability. As set forth in Uniroyal's petition, the expected liability is around $110 million. *See* Pet. at 19. That is greater than the estimated impact of the Coal Act on Eastern Enterprises, *see Eastern Enterprises*, 524 U.S. at 529 (plurality opinion) (estimating $50 to $100 million), which that case's plurality considered to be "a considerable financial burden." *Id.*

On the question of reasonable investment-backed expectations, the *Eastern Enterprises* plurality was impressed by the thirty to fifty year reach back of the Coal Act. *Id.* at 532. The plurality explained that such retroactivity, in combination with the federal government's varying involvement in the coal

industry, would not have given Eastern Enterprises sufficient notice that it would be liable in the future to provide guaranteed health benefits for former employees. *See id.* at 536. Here, although CERCLA's reach back is not as significant in terms of years, it is in terms of reasonable expectations. That conclusion follows for at least two reasons.

First, CERCLA contains no express retroactivity provision, *see United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 732 (8th Cir. 1986), and it is at least arguable that a reasonable person involved to some degree in the treatment or disposal of hazardous materials in the 1970s would not have expected the inchoate legislation that became CERCLA to be applied retroactively.[3]

Second, even assuming CERCLA retroactivity, a reasonable person in Uniroyal's position would not have expected CERCLA's "arranger" liability provision to have been construed as the Eighth Circuit did here, an expectation buttressed by the interpretations of several courts of appeals. Under Section 107(a) of CERCLA, an entity that "arranges" for the treatment or disposal of hazardous materials is liable for

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[3] *Cf. Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21, 25 n.3 (1st Cir. 1997) ("The insurance industry did not foresee the enactment of CERCLA's retroactive strict liability regime . . . ."); *United States v. Olin Corp.*, 927 F. Supp. 1502, 1519 (S.D. Ala. 1996) (holding that CERCLA Sections 106(a) and 107(a) are not retroactive), *rev'd*, 107 F.3d 1506 (11th Cir. 1997); James A. King, *Kayser-Roth, Joslyn, and the Problem of Parent Corporation Liability Under CERCLA*, 25 Akron L. Rev. 123, 124 (1991) (noting that CERCLA's retroactive liability sent shockwaves through the banking and insurance markets); Jennifer R. Yelin (Student Article), *Retroactivity Revisited: A Critical Appraisal of CERCLA's Retroactive Liability Scheme in Light of* Landgraf v. USI Film Products *and* Eastern Enterprises v. Apfel, 8 N.Y.U. Envtl. L.J. 94, 120-36 (1999) (concluding that CERCLA should not be applied retroactively).

clean-up costs. Several courts of appeals have held that mere ownership of such materials, without active control over the same, cannot incur "arranger" liability. *See* Pet. at 8-14 (citing *inter alia*, *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992); *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669 (3d Cir. 2003); *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000); *S. Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402 (11th Cir. 1996), for the proposition that more than mere ownership is necessary to incur "arranger" liability under Section 107(a)). Given both the controversy over CERCLA's retroactive application, as well as the numerous courts of appeals decisions that decline to extend "arranger" liability to parties such as Uniroyal, it is fair to conclude that retroactive application of CERCLA would frustrate Uniroyal's reasonable investment-backed expectations, an important consideration to the *Eastern Enterprises* plurality.

Lastly, the character of the governmental action—retroactive liability running over a hundred million dollars for nonnegligent action—is at least as "unusual" as the retroactive application of liability to Eastern Enterprises. *See Eastern Enterprises*, 524 U.S. at 537 (plurality opinion).

B. Retroactive CERCLA Liability Likely Constitutes a Due Process Violation Under the Test Announced in Justice Kennedy's *Eastern Enterprises* Concurrence

Although Justice Kennedy did not accept the precise reasoning of the plurality, he did agree that the Coal Act as applied to Eastern Enterprises violated the Fifth Amendment. Justice Kennedy noted that the Coal Act's application to Eastern Enterprises was "arbitrary and beyond the legitimate authority of the Government to enact." *Eastern Enterprises*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part). He read the plurality opinion to establish convincingly that the Coal Act's remedy bore no legitimate

relationship to the proffered governmental interests. *Id.* at 549. Given the severe retroactive effect of the legislation on Eastern Enterprises, and given that the latter was in no way the proximate cause of the "resulting chaos" in miner-retiree health and pensions benefits which the Coal Act sought to ameliorate, the application of the Coal Act to Eastern Enterprises would violate due process. *Id.* at 549-50.

A similar result should obtain for Uniroyal. As explained above, a reasonable person in Uniroyal's position would not have expected retroactive liability for its having purchased the raw materials necessary for a contract partner to produce herbicide. Further, Uniroyal is no more responsible for the treatment or disposal of hazardous materials than any other purchaser of finished products whose raw materials include hazardous substances and whose demand is necessarily increased by the additional purchase.

In light of the foregoing, the Eighth Circuit's determination not to apply the tests announced in the *Eastern Enterprise* plurality and Justice Kennedy's concurrence was error; it raises a constitutional question of substantial importance, and merits this Court's review.

II

ACCORDING TO SOUND JURISPRUDENTIAL PRINCIPLES, THE *EASTERN ENTERPRISES* PLURALITY CONTAINS THE CONTROLLING RATIONALE

The Court should grant the petition also to clarify how to ascertain the holding of the Court where no opinion receives a majority of the Members' votes and where the rule announced in *Marks v. United States*, 430 U.S. 188 (1977), does not apply. Under *Marks*, where no opinion of the Court obtains a majority of the Justices' votes, the holding of the Court is expressed by

that opinion joined in by the Members who concurred in the judgment on the narrowest grounds, *see id.* at 193, provided that the opinion comprising the "narrowest grounds" is a logical subset of the remaining opinions agreeing with the Court's judgment. *See United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006). Assuming *arguendo* that neither the *Eastern Enterprises* plurality opinion nor Justice Kennedy's concurrence is a logical subset of the other, *see United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003), it nevertheless is true that the plurality opinion, representing the views of a majority of the Justices *within* the majority directing *Eastern Enterprises*'s holding of unconstitutionality, is the binding opinion on this Court.

First, the Court has referred to the *Eastern Enterprises* plurality as if it were binding. *See Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002).

Second, the United States Reports describes Justice Kennedy's opinion as "concurring in the judgment and dissenting in part." Often when Justice Kennedy disagrees with the reasoning of a principal opinion but agrees with its result, he will write a concurring opinion described as "concurring in the judgment" or "concurring in the result." *See, e.g.*, *Rapanos v. United States*, 126 S. Ct. 2208, 2236 (2006) (Kennedy, J., concurring in the judgment) (advancing a "significant nexus" test in place of the plurality's rationale); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (Kennedy, J., concurring in the judgment) (disagreeing with majority as to why federal courts have jurisdiction over challenges to detention of foreign nationals in Guantanamo); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring in the judgment) (emphasizing that Constitution guarantees right to impartial jury, not to jury composed of specific racial make-up).

And yet, both before and after *Eastern Enterprises*, where his opinions have been labeled as "concurring in part and dissenting in part," Justice Kennedy has concurred only partially with the reasoning of a *majority* opinion—in other words, an opinion that is indisputably binding. *See, e.g.*, *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 166 (2003) (Kennedy, J., concurring in part and dissenting in part) (dissenting from a five-Justice majority); *Buckley v. Fitzsimmons*, 509 U.S. 259, 282 (1993) (Kennedy, J., concurring in part and dissenting in part) (dissenting from a five-Justice majority); *Saudi Arabia v. Nelson*, 507 U.S. 349, 370 (1993) (Kennedy, J., concurring in part and dissenting in part) (dissenting from a five-Justice majority).

Thus, the most natural inference from Justice Kennedy's *Eastern Enterprises* concurrence is that he considered at least part of the plurality opinion to be incorrect yet nevertheless binding. For, to describe any portion of an opinion as "dissenting" makes sense only if that portion of the opinion disagrees with a point that is *held* by the Court, *i.e.*, binding. Presumably, the portion of the plurality opinion from which Justice Kennedy "dissented" is the former's takings analysis. *See Eastern Enterps.*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part) ("I . . . disagree with the plurality's Takings Clause analysis . . . ."). Thus, Justice Kennedy's concurrence, because labeled as partly dissenting, confirms that even he viewed the plurality opinion as in some respects binding.

Third, the rule encourages those Justices who might otherwise depart from the common reasoning of their colleagues to attempt to reconcile their positions or, at the very least, choose to remain silent, and thus foster certainty and

promote settlement of expectations,[4] while avoiding the functional equivalent of *seriatim* opinions. *Cf.* Henry S. Manley, *Nonpareil Among Judges*, 34 Cornell L.Q. 50 (1948) (suggesting that modern Court's practice of issuing numerous concurrences and dissents marks a return to the *seriatim* practice of the pre-Marshall Court).

For these reasons, in cases where the *Marks* rule is inapplicable, it is proper for the Court to look to the plurality opinion for the binding rule of law. Under that theory, the Eighth Circuit was compelled to apply the three-factor test set forth in Justice O'Connor's opinion. The appellate court's failure to do so raises jurisprudential questions of large magnitude, meriting this Court's review.

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[4] *See* William A. Bowen, *Dissenting Opinions*, 17 Green Bag 690, 693 (1905) ("The first duty of judges is, therefore, to render more exact that science of which they are the chief professors; and in so far as they discourage its slow and painful progress to that end, they undermine the foundations of its authority and menace the security of the people.").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari filed by Uniroyal should be granted.

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